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No. 96-1616

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MARTHA LEIJA and JERRY LEIJA
as next friends of ROSEMARIE LEIJA, a minor,

Petitioner

vs.

CANUTILLO INDEPENDENT SCHOOL DISTRICT

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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54 pp

QUESTION PRESENTED

Did the Fifth Circuit properly reject strict liability as the standard of liability under Title IX of the Education Amendments of 1972 where no school administrator or school board member had any knowledge of the teacher's molestation of the student?

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

REASONS WHY THE PETITION SHOULD BE DENIED 7

I. The Decision Below Does Not Raise The Broad Question Presented By Petitioners. 7

II. The Decision Below Does Not Conflict With The Decisions Of Other Circuits 9

III. The Fifth Circuit Analysis Is Correct -- Strict Liability Is Not The Appropriate Liability Standard 14

A. Intentional Discrimination Is Required To Obtain Damages Under "Spending Clause" Legislation 14

B. Respondents Are Not Liable Under Any Appropriate Standard of Liability. 17

1. Strict Liability Does Not Apply To Actions Under Title IX 17

2. This Case Is Not The Appropriate Vehicle For Deciding To What Extent Title VII Principles Will Apply In Title IX Actions. 18

C. New OCR Guidelines Do Not Affect The Fifth Circuit Decision 21

IV. The Question Presented Is Not Important 23

CONCLUSION 24

APPENDIX A A-1

APPENDIX B A-3

APPENDIX C A-5

APPENDIX D A-7

APPENDIX E A-9

APPENDIX F A-11

APPENDIX G A-13

APPENDIX H A-15

APPENDIX I A-17

TABLE OF AUTHORITIES

CASES

Alexander v. Yale Univ.,
459 F.Supp. 1 (D. Conn. 1977),
aff'd, 631 F.2d 178 (2nd Cir. 1980) 19

Bougher v. Univ. of Pittsburgh,
713 F.Supp. 139 (W.D. Pa.),
aff'd on other grounds, 882 F.2d 74
(3rd Cir. 1989) 18

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 22

Brown v. Hot, Sexy and Safer Productions, Inc.,
68 F.3d 525 (1st Cir. 1995), *cert. denied*,
____ U.S. ____, 116 S.Ct. 1044 (1996) 13

Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 15, 17

Canutillo Indep. Sch. Dist. v. Leija,
101 F.3d 393 (5th Cir. 1996) 1, 8, 24

Capitano v. Secretary of Health & Human Servs.,
732 F.2d 1066 (2nd Cir. 1984) 23

Davis v. Monroe County Bd. of Ed.,
74 F.3d 1186, *vacated*, 91 F.3d 1418
(*en banc*) (11th Cir. 1996) 11, 12

Doe v. Claiborne County,
103 F.3d 495 (6th Cir. 1996) 12

Doe v. Lago Vista Indep. Sch. Dist.,
106 F.3d 1223 (5th Cir. 1997) 8

Doe v. Petaluma City Sch. Dist.,
830 F.Supp. 1560 (N.D. Calif. 1993),
reconsidered and revised, 949 F.Supp. 1415
(N.D. Cal. 1996) 14

E.E.O.C. v. Hacienda Hotel,
881 F.2d 1504 (9th Cir. 1989) 20

Ellerth v. Burlington Industries, Inc.,
102 F.3d 848 (7th Cir. 1996),
vacated, pending rehearing *en banc*
(January 28, 1997) 13

Floyd v. Waiters,
831 F.Supp. 867 (M.D. Ga. 1993) 19

Franklin v. Gwinnett County Pub. Schs.,
503 U.S. 60 (1992) 9, 17

Franklin v. Gwinnett County Pub. Schs.,
911 F.2d 617 (11th Cir. 1990),
rev'd on other grounds,
503 U.S. 60 (1992) 14, 18

Guardians Ass'n v. Civil Service Comm'n of N.Y.,
463 U.S. 582 (1983) 15, 17

Hall v. Gus Const. Co.,
842 F.2d 1010 (8th Cir. 1988) 19

Henson v. City of Dundee,
682 F.2d 897 (11th Cir. 1982) 14

Hirschfield v. New Mexico Corrections Dep't.,
916 F.2d 572 (10th Cir. 1990) 19, 20

Howard v. Bd. of Ed. of Sycamore Community Unit,
876 F.Supp. 959 (N.D. Ill. 1995) 19

Hunter v. Allis-Chalmers Corp.,
797 F.2d 1417 (7th Cir. 1986) 10, 20

Kelley v. E.P.A.,
15 F.3d 1100 (D.C. Cir. 1994),
cert. denied, ____ U.S. ____,
115 S.Ct 900 (1995) 23

Kinman v. Omaha Pub. Sch. Dist.,
94 F.3d 463 (8th Cir. 1996) 9, 10, 12

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 22, 23

Leija v. Canutillo Indep. Sch. Dist.,
887 F. Supp. 947 (W.D. Tex. 1995) 7, 8, 20

Lieberman v. Univ. of Chicago,
660 F.2d 1185 (7th Cir. 1981),
cert. denied, 456 U.S. 937 (1982) 14

Lipsett v. Univ. of Puerto Rico,
864 F.2d 881 (1st Cir. 1988) 10

Mabry v. State Bd. of Community Colleges,
813 F.2d 311 (10th Cir.), *cert. denied*,
484 U.S. 849 (1987) 13

Marsh v. Dallas Indep. Sch. Dist.,
1997 WL 118416 (N.D. Tex. March 10, 1997) 8

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) 10, 19

Murray v. New York Univ. College of Dentistry,
57 F.3d 243 (2d Cir. 1995) 9, 11, 18, 20, A-5

O'Connor v. Peru State College,
781 F.2d 632 (8th Cir. 1986) 13

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 17 (1981) 15, 17

Preston v. Commonwealth of Virginia,
31 F.3d 203 (4th Cir. 1994) 13, 18

Roberts v. Colorado State Bank of Agriculture,
998 F.2d 824 (10th Cir.), *cert. denied*,
510 U.S. 1004 (1993) 13, 18

Rosa H. v. San Elizario Indep. Sch. Dist.,
106 F.3d 648 (5th Cir. 1997) 8, 14, 19, 20, 22

Rowinsky v. Bryan Indep. Sch. Dist.,
80 F.3d 1006 (5th Cir.), *cert. denied*,
____ U.S. ____, 117 U.S. 165 (1996) 14, 16, 17

Seamons v. Snow,
84 F.3d 1226 (10th Cir. 1996) 13

Wright v. Director, Federal Emergency Mgmt. Agency,
913 F.2d 1566 (11th Cir. 1990) 22

Yusuf v. Vasser College,
35 F.3d 709 (2d Cir. 1994) 13

STATUTES

20 U.S.C. § 1681 ..... 2, 19

20 U.S.C. § 1682 22

28 U.S.C. § 1292 3

34 C.F.R. §§ 106.1-106.61 16

42 U.S.C. § 1981 20

42 U.S.C. § 1983 2

42 U.S.C. § 2000 19

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Canutillo Independent School District ("CISD"), respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Fifth Circuit's decision in *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996).

STATEMENT OF THE CASE

Proceedings Below

Petitioners filed suit against Respondent and its former employee Tony Perales ("Perales"), alleging that their daughter Rosemarie Leija ("Rosemarie") was sexually molested by Perales, her physical education teacher. They asserted claims under 20 U.S.C. § 1681 ("Title IX")[1] and 42 U.S.C. § 1983.[2]

On the eve of trial, the district court granted Respondent's Motion for Summary Judgment on the § 1983 claim.[3] The case then proceeded to trial on Petitioners' Title IX claim. After two days of deliberations, the jury returned a verdict awarding Petitioners $900,000.00 in past compensatory damages and $500,000.00 in future compensatory damages. The district court ultimately entered an order that found

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[1]Title IX prohibits gender discrimination in educational programs receiving federal funds and states, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. § 1681(a).

[2]42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of [law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

[3]Appendix A and D.

Respondent liable to Petitioners under Title IX, but which ordered a new trial on damages.[4]

Respondent filed an interlocutory appeal under 28 U.S.C. § 1292(b) challenging the district court's conclusion that, under Title IX, Respondent was strictly liable for the illegal conduct of its employee. The Fifth Circuit reversed the interlocutory order and remanded the case to the district court for entry of a final judgment in favor of the Respondent.

On February 18, 1997, the district court entered its final judgment, consistent with the Fifth Circuit mandate, ordering that the Petitioners take nothing and dismissing the action on the merits. Petitioners did not file a motion for new trial or notice of appeal; the district court's judgment, therefore, became final and non-appealable on or about March 20, 1997.

Statement of Facts

The Petitioners omit several important facts and rely heavily on a series of disputed or unfounded facts. For example, they suggest that CISD did not have policies, procedures, or training regarding child abuse prior to 1991. In fact, the record proves that CISD promulgated policies and procedures including child abuse prohibitions and reporting obligations, and several teachers testified that anti-victimization programs were implemented by CISD.[5] Several teachers, including Perales, testified that they were aware of the illegality of child abuse and the consequences of employment termination.

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[4]Appendix B and C.

[5]Appendix E, F, G, H and I.

Petitioners also state that the classroom teacher was designated by the Student Handbook as the person to whom to report acts of harassment or molestation.[6] In fact, the Student Handbook that Petitioners mention states that such reports are to be handled differently from other complaints and are to be presented to the Title IX coordinator.[7]

Petitioners state that Perales was authorized to control the behavior, discipline, and impose negative sanctions and imply that this gave him authority to abuse and molest.[8] The authority of all teachers, however, is strictly limited by laws against child abuse, policies and procedures of CISD, the state code of ethics and teachers' oath of office. Teachers, including Perales, testified that Perales' conduct was illegal and contrary to CISD policies and procedures; a physical education teacher testified that he was not authorized to touch the children and could not direct them as to where they sit.

Petitioners suggest also that there was no controverting evidence that notice to the classroom teacher was sufficient under Title IX.[9] They fail to acknowledge, among other things, the Student Handbook that specifies Esther McLeod, the Title IX Coordinator, as the appropriate person for receiving such complaints.[10]

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[6]Petition, pp. 2-3.

[7]Appendix E.

[8]Petition, p. 3.

[9]Petition, p. 13.

[10]Appendix E.

Evidence presented during the trial established that:

- Rosemarie began attending Canutillo Elementary School during the 1989-90 school year;

- The only contact between Perales and Rosemarie occurred during the 1989-90 school year;

- Rosemarie did not have Perales as a physical education/health instructor after the 1989-1990 school year;

- While Plaintiffs presented evidence of a "hostile environment," there was no proof of any *quid pro quo* harassment of Rosemarie;

- Perales concealed his misconduct from school officials by acting behind closed doors and away from supervisors and other teachers;

- The Principal, Assistant Superintendent, Superintendent, and Board of Trustees, did not know about Perales' conduct toward Rosemarie;

- The only report regarding Perales' conduct toward Rosemarie was to Pam Mendoza, Rosemarie's classroom teacher;

- A series of teachers testified that they were unaware of Perales' conduct during Rosemarie's second grade year;

- Prior to 1993, Rosemarie's father and mother did not believe that Perales' conduct toward Rosemarie reached the level of molestation or abuse;

- Contrary to the Petition, Respondent's policies and procedures in effect during the 1989-90 school year prohibited sexual abuse and sexual discrimination against children;[11]

- Respondent initiated a formal Title IX complaint procedure, naming a Title IX coordinator and announcing procedures for presenting a Title IX or sexual harassment complaint;

- Perales' conduct violated his oath of office, Respondent's policies and procedures, and rules applicable to teachers at Canutillo Elementary School;

- Perales was removed from the classroom and campus once the Superintendent was notified of the unlawful conduct;

- Perales was the first known perpetrator of child abuse or sexual harassment at CISD;

- Perales had been a teacher in CISD for approximately eight years before this incident, and he had no prior history of such conduct;

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[11]Appendix E, F, G, H, and I.

- Perales and Mendoza were classroom teachers with limited authority and without administrative responsibilities.

The record demonstrates that Respondent did not know, and could not have known, about Perales' conduct until after Rosemarie entered her third grade year and no longer had contact with Perales.[12] Rosemarie was never subjected to any abuse after the first report to school administrators. Once administrators were notified, Perales was immediately removed from the classroom and, ultimately, terminated as a school employee.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Raise The Broad Question Presented By Petitioners.

The Question Presented suggested by the Petitioners is overbroad and, therefore, misleading. The issue in this case, properly framed according to the precise holding of the case, is narrow. The decision below turned solely on whether, under Title IX of the Education Amendments of 1972, a school district is strictly liable for its teacher's sexual abuse of a

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[12]The district court found that CISD did not know, and had no reason to know, of Perales' molestation of Rosemarie. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947, 949 (W.D. Tex. 1995). Further, it found no discriminatory custom or practice and no deliberate indifference. Appendix A, B, C, and D.

student. *Leija*, 101 F.3d at 395, 396, 400 (5th Cir. 1996). Subsequent decisions by the Fifth Circuit underscore the limited impact of the *Leija* decision:

> We recently rejected the notion that this [Title IX] language creates strict liability on the part of school districts whose teachers sexually abuse students. *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398-400 (5th Cir. 1996). But the facts in *Leija* did not require us to confront the question of what the liability standard in teacher-student sexual abuse cases actually is.

Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 652 (5th Cir. 1997); *see also*, *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997); *Marsh v. Dallas Indep. Sch. Dist.*, 1997 WL 118416 (N.D. Tex. March 10, 1997).

The Petition amalgamates *Leija* and the Fifth Circuit's subsequent decisions, *Rosa H.* and *Lago Vista*, as if they were a single case -- which they are not. This Court, however, reviews judgments, not trends. The true question in this case is whether the Fifth Circuit correctly rejected strict liability as a basis for recovery under Title IX when no school administrator or school board member had any knowledge of the teacher's molestation of the student.

II. The Decision Below Does Not Conflict With The Decisions Of Other Circuits.[13]

Petitioners attempt to demonstrate a conflict among the circuits with string cites and scant discussion. In fact, not one of the cases cited by Petitioners represents a substantial conflict on the narrow issue presented in this case. No court of appeals has recognized strict liability as a basis for recovery. Although other courts have embraced Title VII-style agency or negligence standards, the Fifth Circuit in *Leija* did not reject these alternative theories. Rather, the Fifth Circuit concluded that Petitioners' Title IX claim would fail even if such alternative standards did apply. A true conflict of decisions simply does not exist.

Even under the decisions that rely on Title VII standards of liability, Respondent could not be vicariously liable for the conduct of Tony Perales. *See, e.g.*, *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 247-49 (2d Cir. 1995) (no Title IX liability because of a lack of knowledge or notice); *cf.*, *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (Title IX liability is possible with evidence

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[13]Petitioners do not claim that the Fifth Circuit opinion conflicts with *Franklin* or any other Supreme Court precedent. Unlike the facts in this case, the *Franklin* decision found allegations of knowledge of harassment by management-level administrators:

> The complaint further alleges that though they became aware of and investigated Hill's sexual harassment of Franklin and other students, *teachers and administrators* took no action to halt it and discouraged Franklin from pressing charges against Hill. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64 (1992)(emphasis added).

of inaction after notice of molestation to superintendent, principal, and numerous other school employees).[14]

In *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 899-90 (1st Cir. 1988), the First Circuit reviewed a district court's summary dismissal of Title IX claims arising in the employment context. In contrast to Petitioners, the plaintiffs in *Lipsett* did not seek monetary damages under Title IX, but simply requested declaratory and injunctive relief. *Lipsett*, 864 F.2d at 884 n.3. Finding that the plaintiff presented a prima facie case of both *quid pro quo* and hostile environment harassment claims, the court of appeals ordered a trial on the merits. Additionally, the court of appeals followed the lead of the Supreme Court by rejecting the contention that "employers are always automatically liable for sexual harassment by their supervisors." *Lipsett*, 864 F.2d 881, 864; *citing*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). Rather than strictly adhering to agency principles, which were meant to be mere "guidance," the court required proof that the "employer knew or should have known of the harassment, and took no effectual action to correct the situation." *Lipsett*, 864 F.2d at 901; *citing Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417,

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[14]The *Kinman* decision recognizes the narrow, fact bound nature of Title IX decisions:

> The divergence of views on this issue [of institutional liability] stems in part from the factual disparity in the cases. Title IX cases vary both in the type of discrimination alleged . . . and in the identity of the perpetrators and victims . . . . *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 468-69 (8th Cir. 1996).

Even *Kinman* recognizes the need for notice and knowledge by school administrators. *Kinman*, 94 F.3d at 469.

1421 (7th Cir. 1986). The Fifth Circuit's decision in *Leija* is distinguishable since it is an action for damages arising in the education, not the employment, context. Further, both the district court and court of appeals found that there was no evidence of *quid pro quo* harassment or that Respondent knew or should have known of the unlawful conduct.

In *Murray v. New York University College of Dentistry*, 57 F.3d 243, 249-51 (2d Cir. 1995), the Second Circuit utilized Title VII principles and affirmed the dismissal of Title IX claims. Because the plaintiff failed to demonstrate that her employer knew or should have known of the hostile environment, the court of appeals found that the Title IX claims were properly dismissed. *Murray*, 57 F.3d at 249-51. The Fifth Circuit's decision, therefore, does not conflict -- but rather conforms -- with the Title VII analysis articulated in *Murray*.

Petitioners also cite *Davis v. Monroe County Bd. of Ed.*, 74 F.3d 1186, *vacated*, 91 F.3d 1418 (*en banc*) (11th Cir. 1996),[15] but that decision was vacated on August 1, 1996, upon the granting of the school district's petition for rehearing *en banc*. Even the vacated decision cited by the Petitioners does not conflict with the decision of the Fifth Circuit. *Davis* did

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[15]The court stated:

> Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities *knowingly* failed to act to eliminate the harassment. . . . likewise, when an educational institution *knowingly* fails to take action to remedy a hostile environment . . . . an employee can demonstrate that an employer knew of the harassment by showing that *she complained to higher management* of the harassment or by showing the pervasiveness of the harassment . . . . *Davis*, 74 F.3d at 1193-95 (emphasis added).

not permit strict liability; and, unlike the instant case, the principal allegedly had actual notice. *Davis*, 74 F.3d at 1195.

In *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467, 469 (8th Cir. 1996), the Eighth Circuit recognized that the divergence of views on Title IX liability "stems in part from the factual disparity in the cases." *Kinman* held that, while an employer should not be held liable "unless the employer itself has engaged in some culpable behavior," it reversed the district court's summary judgment since there was evidence that the employer knew or should have known of the harassment and failed to take appropriate remedial action. *Kinman*, 94 F.3d at 469.[16]

In *Doe v. Claiborne County*, 103 F.3d 495, 515 (6th Cir. 1996),[17] the Sixth Circuit reversed dismissal of Title IX claims, stating "what the defendants knew, and when they knew it, is evidence upon which a material issue in this case hinges."

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[16]The court stated:

> In such [hostile environment] cases, the employer should not be held liable *unless the employer itself has engaged in some culpable behavior*. *Kinman*, 94 F.3d at 469 (emphasis added).

[17]The court stated:

> [April 29, 1997W]hether conduct about which a plaintiff complains creates a "hostile environment" under Title IX, and *whether the educational institution took appropriate action after knowing of inappropriate conduct*, are factual questions for the jury to resolve . . . . What the defendants knew, and when they knew it, is evidence upon which a material issue in this case hinges. *Doe*, 103 F.3d at 514 (emphasis added).

Again, strict liability was not the standard, and management-level personnel allegedly were on notice.

In *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), the Tenth Circuit rejected a student's Title IX claim because he failed to show that the school officials' conduct was gender-based. The court did not recognize a strict liability standard.

The remaining cases cited by the Petitioners present issues of discrimination arising in the context of employment,[18] facilities,[19] school-sponsored programs,[20] or discipline.[21] One case, although vacated on rehearing *en banc*, failed to raise a Title IX issue in any context.[22] Several of the cases, in fact, actually rejected the validity of the Title IX claims.[23]

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[18] *Preston v. Commonwealth of Virginia*, 31 F.3d 203 (4th Cir. 1994); *O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir. 1986); *Mabry v. State Bd of Community Colleges*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987).

[19] *Roberts v. Colorado State Bank of Agriculture*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

[20] *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 1044 (1996).

[21] *Yusuf v. Vasser College*, 35 F.3d 709 (2d Cir. 1994).

[22] *Ellerth v. Burlington Industries, Inc.*, 102 F.3d 848 (7th Cir. 1996), *vacated*, pending rehearing *en banc* (January 28, 1997).

[23] *Mabry v. State Bd. of Community Colleges*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987); *see also, Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996); *Preston v. Commonwealth of Virginia*, 31 F.3d 203 (4th Cir. 1994); *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 1044 (1996); *O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir. 1986).

In short, while the cases cited by the Petitioners may rely on a Title VII-style analysis to formulate the Title IX standard of liability, not one case detracts from the Fifth Circuit's conclusion that Title IX claims cannot be resolved under standards of strict liability. Not one case cited by the Petitioners would allow a recovery under Title IX without proof that management-level personnel knew about the illegal conduct and failed to take prompt remedial action. Vicarious liability has not been imposed by the appellate courts based simply on the conduct of a classroom teacher. As in Title VII cases,[24] each court has held that higher management must be aware of the discrimination and fail to take appropriate remedial action.

III. The Fifth Circuit Analysis Is Correct -- Strict Liability Is Not The Appropriate Liability Standard.

A. Intentional Discrimination Is Required To Obtain Damages Under "Spending Clause" Legislation.

Many lower courts have concluded that Title IX is a Spending Clause statute.[25] Title IX is patterned after the anti-

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[24]*Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

[25]*Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997); *citing, Lieberman v. University of Chicago*, 660 F.2d 1185, 1187 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982); *see Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ____ U.S. ____, 117 U.S. 165 (1996); *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560, 1574 n.9 (N.D. Calif. 1993), *reconsidered and revised*, 949 F.Supp. 1415 (N.D. Cal. 1996); *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 622

discrimination statute Title VI,[26] and Title VI was enacted pursuant to the Spending Clause.[27] The Spending Clause enables Congress to place conditions on the receipt of federal dollars by grant recipients.[28] The legitimacy of the conditions is the *voluntary* and *knowing* acceptance of the conditions by the grant recipient.[29] The Petitioners have disregarded this important issue, which simply is non-existent in the Title VII cases cited by Petitioners.

The analysis in *Franklin* of Title IX was based largely on the Title VI case *Guardians Association v. Civil Service Commission of New York*,[30] a case decided without a majority opinion. *Guardians* involved an employment test that had a disproportionate impact on racial minorities, which a majority of justices viewed as unintentional discrimination, thereby precluding an award of damages. "In this and similar situations," Justice White wrote, "it is not immediately obvious what the grantee's obligations were and it is surely not obvious that the grantee was aware that it was administering the

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(11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992).

[26]*See Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-95 (1979).

[27]*See Guardians Ass'n v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 598-599 (1983).

[28]*See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[29]451 U.S. at 17.

[30]463 U.S. 582 (1983).

program in violation of the statute or regulations."[31] The limitation on remedies is particularly appropriate where the plaintiff is pursuing a private cause of action "implied by the judiciary rather than expressly created by Congress."[32]

In this case, the recipient of federal funds was the Respondent's Board of Trustees, not Perales. It surely was not "obvious" that the Respondent, in 1989 and 1990, was violating Title IX and would be held strictly liable for the secret and illegal acts of one of its teachers. During the entire period of Rosemarie's enrollment at CISD, no federal regulations were in existence on the issue of sexual harassment. The regulations that exist (then and now) concern athletics, admission, housing, and the like. *See* 34 C.F.R. §§ 106.1-106.61. The regulations focus on the policies and practices of the grant recipient in administering those programs. Likewise, the legislative history of Title IX shows that both supporters and opponents focused exclusively on the policies and practices of grant recipients.[33]

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[31]463 U.S. at 598. Likewise, *Franklin* states that damages are unavailable in cases of "unintentional" discrimination because the entity lacks notice that it will be held monetarily liable. 503 U.S. at 74.

[32]*Id.* at 597.

[33]*See Rowinsky*, 80 F.3d at 1013-14 (describing floor debates). Even the dissent in *Rowinsky* recognized the importance of notice to management-level administrators as a condition to Title IX liability:

> [Title IX places] on the school board a duty not to discriminate on the basis of sex by *knowingly* failing to take prompt corrective action . . . . the statute affords protection when [an educational institution] *knowingly* fails to take reasonable steps within its power to prevent sexual harassment . . . . [a Title IX plaintiff] may recover for damages sustained thereby from a federally funded institution if the board had knowledge of the harassment

This Court's opinions in *Guardians, Cannon,* and *Pennhurst* have focused on the policies of the grant recipient itself. The secretive and criminal acts of a teacher may not be fairly characterized as a policy or practice of the grant recipient.

B. Respondents Are Not Liable Under Any Appropriate Standard of Liability.

1. Strict Liability Does Not Apply To Actions Under Title IX.

Strict liability has never been recognized as a valid basis for imputing liability to municipalities or governmental entities, and there is no Title IX precedent for doing so in "hostile environment" cases. The standard for imputing liability for damages under Title VI is based on intent, not strict liability. *E.g.*, *Guardians Ass'n*, 463 U.S. at 596-97. Since Title IX is patterned after Title VI, the two statutes must be construed in a similar fashion, and the same standard of imputed liability should apply. That is, Respondent cannot be liable without proof, at a minimum, that its Board of Trustees

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and failed to take corrective action." *If its board had knowledge of the harassment* . . . . [Plaintiffs] show that the school board had actual knowledge that the plaintiffs were being subjected to sexual harassment . . . . Indeed, it would appear that the school board in the case at bar, was given as much, if not more, *knowledge and notice* of the ongoing sexual harassment of the Plaintiffs than was given to the school board in the *Franklin* case. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ____ U.S. ____, 117 U.S. 165 (1996) (dissenting opinion, emphasis added).

knew or should have known of Perales' abuse and failed to take remedial action. *Murray*, 57 F.3d at 248-251.

2. This Case Is Not The Appropriate Vehicle For Deciding To What Extent Title VII Principles Will Apply In Title IX Actions.

Petitioners believe that Title IX harassment claims should be treated exactly like Title VII hostile environment claims. The Fifth Circuit did not decide this question, and certiorari should not be granted for the purpose of providing an advisory opinion. Furthermore, the analogy suggested by Petitioners is imperfect.

Although Title IX and Title VII share a common prohibition against "sexual discrimination," and although some Title VII doctrines have been found to be useful in certain Title IX cases,[34] the two statutes are substantively different.[35] As this Court explained in *North Haven* in comparing Title VI and

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[34]*See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993)(using Title VII "disparate impact" concept in case challenging discontinuation of women's softball program), *cert. denied*, 510 U.S. 1004 (1993); *Preston v. Commonwealth of Va.*, 31 F.3d 203, 206 (4th Cir. 1994) (using "mixed motive" concept in Title IX employment action).

[35]*See, e.g., Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 145 (W.D. Pa.)(declining to "blandly blur the distinctions" between Title VII and Title IX and refusing "to transfer wholesale the EEOC guidelines into an area for which they were not drafted"), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989); *see also Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617, 622 (11th Cir. 1990)(concluding that application of Title VII law to Title IX cases was too "confusing"), *rev'd on other grounds*, 503 U.S. 60 (1992).

Title IX, "[f]or although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."[36]

One of the key differences between Title IX and Title VII, completely ignored by Petitioners, is that Title VII expressly defines "employer" to include the employer's "agents."[37] Consequently, courts have applied the common law rules of agency to Title VII claims.[38] In contrast, Title IX contains no "agency" provision, and, thus, there is no textual support for applying a Title VII-style analysis.[39] "Title IX does not instruct courts to impose liability based on anything other than the acts of the recipients of federal funds."[40]

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[36] 456 U.S. at 530.

[37] 42 U.S.C. § 2000e(b)(1994); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (stating that courts should look to common-law agency principles for evaluating employer liability under Title VII).

[38] *See, e.g., Hall v. Gus Const. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Hirschfield v. New Mexico Corrections Dep't.*, 916 F.2d 572, 577 (10th Cir. 1990).

[39] *See Howard v. Bd. of Ed. of Sycamore Community Unit*, 876 F.Supp. 959, 972-74 (N.D. Ill. 1995) (rejecting Title VII agency analysis in Title IX harassment case); *Floyd v. Waiters*, 831 F.Supp. 867, 876 (M.D. Ga. 1993) (rejecting Title VII agency analysis in Title IX harassment case); *see generally* Schneider, "Sexual Harassment and Higher Education," 65 TEX. L. REV. 525, 568-571 (1987) (analyzing absence of agency provision in Title IX); *see also Alexander v. Yale Univ.*, 459 F.Supp. 1, 3 (D. Conn. 1977)("the concept of mere *respondeat superior* appears ill-adapted to the question of Title IX sex discrimination based on harassment incidents"), *aff'd*, 631 F.2d 178 (2nd Cir. 1980).

[40] *Rosa H.*, 106 F.3d at 648; 20 U.S.C. § 1681(a).

Another difference between the two statutes is that, unlike Title IX, Title VII's negligence standard is tempered by statutory provisions that protect the employer from far-reaching liability, the most important of which is a statutory ceiling on the amount of monetary damages that are recoverable.[41] Title IX contains no statutory restrictions on damages, which may, as shown by the original *Leija* verdict, result in paralyzing damage awards against taxpayer-funded school districts.

While several circuits and district courts have utilized Title VII principles for some purposes under Title IX, the Fifth Circuit did *not* render an inconsistent decision in this case. It simply held that Title IX liability is not appropriate in this case since there was no evidence of knowledge or notice.

Even if the Fifth Circuit had adopted the Title VII "knew or should have known" standard, the decision would have been the same. Without knowledge or notice, the only other possible standard is "strict liability," which has been rejected by courts as the appropriate test under Title IX. The Fifth Circuit properly ruled that, even if Title VII agency principles had been applied in this case, Respondent could not be found liable for the acts of Perales. *Murray*, 57 F.3d at 248-51; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Hirschfeld*, 916 F.2d at 577; *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989).

Only Ms. Mendoza, a classroom teacher, had some notice concerning Perales' conduct; there is no evidence that the Principal, Superintendent, or Board knew or should have

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[41] *See* 42 U.S.C. § 1981a(b)(3) (1994). Damages were not available under Title VII until 1991 when Congress enacted Section 1981a. Title IX is notably missing from Section 1981a. The omission of Title IX from Section 1981a suggests "that, in 1991, Congress did not view Title IX as the kind of legislation that could generate expansive liability." *Rosa H.*, 106 F.3d at 648 n. 4.

known of Perales' conduct toward Rosemarie. Additionally, it is undisputed that Respondent enacted policies that prohibit the sexual harassment of students and that establish a process to report incidents of harassment.

C. New OCR Guidelines Do Not Affect The Fifth Circuit Decision.

Petitioners urge the Court to accept certiorari on the ground that the Office of Civil Rights ("OCR") of the U. S. Department of Education recently promulgated guidelines on sexual harassment. The existence of these guidelines do not enhance the reviewability of the decision below.

On October 4, 1996, four years after this Court's decision in *Franklin* and long after the trial in this case, the Office of Civil Rights issued its first draft guidelines on teacher-student sexual harassment.[42] On November 27, 1996, the date that the Fifth Circuit reversed the interlocutory judgment in this case, the proposed guidelines still had not been finalized.[43] Neither the court below nor any circuit court has had the opportunity to consider the final guidelines published on March 13, 1997.

Moreover, the new substantive guidelines cannot be given retroactive effect. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when

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[42]61 Fed. Reg. 52172 (Oct. 4, 1996).

[43]The guidelines were published in final form on March 13, 1997. 62 Fed. Reg. 12034 (March 13, 1997).

the conduct took place has timeless and universal appeal."[44] The new guidelines fail to provide a clear statement of retroactive intent, and Title IX itself contains no language authorizing the Department to promulgate retroactive rules.[45] "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[46]

The Spending Clause also comes into play:

> [R]ecipients of Title IX funds are bound by their agreement with the federal government. The government can add strings to the Title IX funds as it disburses them. But it cannot modify past agreements with recipients by unilaterally issuing guidelines through the Department of Education. . . We make no comment on how these guidelines might affect cases in which a school district accepts Title IX funds after the guidelines' promulgation date.[47]

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[44]*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 1497 (1994); *see also, Rosa H.*, 106 F.3d at 658.

[45]*See* 20 U.S.C. § 1682. A general grant of rulemaking authority does not constitute authority to promulgate retroactive rules. *See Wright v. Director, Federal Emergency Mgmt. Agency*, 913 F.2d 1566, 1572 (11th Cir. 1990); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 213 (1988).

[46]*Bowen*, 488 U.S. at 208.

[47]*Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997).

Petitioners improperly wish to use the new guidelines to "increase a party's liability for past conduct."[48] OCR's new guidelines on how to comply with Title IX are not authoritative on whether past acts of alleged non-compliance may result in a money judgment. OCR expertise is irrelevant to the question of when damages are available under Title IX, "a function clearly within the purview of judicial competence."[49] In short, the recent promulgation of OCR guidelines provides no compelling basis on which to grant certiorari.

IV. The Question Presented Is Not Important

The Question Presented, properly formulated in the context of the Fifth Circuit decision, is *not* whether sexual harassment is damaging or whether schools have an obligation to respond to Title IX complaints. This case does not present issues regarding the sufficiency of Respondent's Title IX training, policies, or procedures.

Instead, the Question Presented simply asks whether a school district is strictly liable for the discriminatory acts of its personnel -- even though it had no prior knowledge of the misconduct. As mentioned before, the courts of appeal are not in conflict on this issue; not one appellate court has attempted to impose liability without fault.

The Question Presented arises from a fact bound decision wherein the district court and the court of appeals agreed that Petitioners failed to establish that Respondent -- the

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[48] *Landgraf*, 511 U.S. 244, 114 S.Ct. at 1505.

[49] *Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066, 1075 (2nd Cir. 1984); *Kelley v. E.P.A.*, 15 F.3d 1100, 1107-09 (D.C. Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct 900 (1995).

grant recipient -- knew, or should have known, of the discriminatory acts of a physical education teacher.[50] The court of appeals simply disagreed with the district court that damages under Title IX are predicated on strict liability principles; and, then ruled that other standards of liability -- whether based upon Title VII, agency, or other concepts -- also precluded recovery.

The Question Presented is, therefore, not one of sufficient import for review by this Court.

CONCLUSION

In an attempt to elevate this case into one worthy of review, the Petitioners grossly exaggerate the impact of the decision below and represent that a conflict exists in the circuit courts when none in fact exists. The Petitioners also assert that the decision below conflicts with newly promulgated guidelines of the U.S. Department of Education's Office of Civil Rights. The OCR guidelines were not raised by Petitioners as a possible issue on appeal until *after* the Fifth Circuit rendered its decision.

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[50]The Fifth Circuit specifically limits its decision to the unique facts of the case:

> [B]ased on the facts in this case (especially because the only notice was to another teacher), it is not necessary now to move beyond our rejection of strict liability and adopt a liability standard for Title IX cases of the type at hand.

Leija, 101 F.3d at 400. The broader issues, such as the Question Presented proposed by Petitioners, were left for subsequent decision of the court of appeals.

Contrary to Petitioners' allegations, the Fifth Circuit did not reject "any application of Title VII precepts" *or* abolish "any possibility for liability under Title IX."[51] Instead, the Fifth Circuit simply ruled that school districts are not subject to Title IX liability under strict liability standards. The district court found, and the court of appeals agreed, that the Petitioners failed to show that the school district had prior notice of the harassment and, thus, did not fail to take appropriate remedial action.

Petitioners' emotional criticism of the Fifth Circuit opinion attempts to obscure the fact that the court of appeals was engaged in the unemotional task of interpreting a federal statute. In reaching its conclusions about the parameters of Title IX, the Fifth Circuit analyzed the text, legislative history, and Spending Clause origin of Title IX.

The Fifth Circuit opinion does not purport to be a referendum on sexual harassment and does not invite the nation's school authorities to ignore the problems of sexual harassment in the schools. School districts may be investigated by the OCR, may lose their federal funding, may be directed to make changes in their procedures or policies, and may be sued for damages when intentional discrimination by school authorities is established. Furthermore, school administrators may be sued in their individual capacities under 42 U.S.C. § 1983 if they disregard allegations of sexual abuse by school employees. These sources of liability, combined with a natural pedagogical concern, create a powerful incentive for educators to protect students. Finally, students have common law remedies. As Petitioners did in this case, students may file criminal charges and initiate a civil action directly against the perpetrator.

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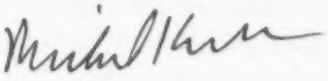
[51]Petition, p. 7.

Absent evidence of intentional discrimination based on gender by the grant recipient, the judicial inquiry under Title IX should end. The Fifth Circuit correctly ruled that, on the record in this case, Title IX liability cannot be imposed where the school district did not know -- and could not reasonably have known -- of the misconduct.

The petition for writ of certiorari, therefore, should be denied.

DATED: May 8, 1997.

Respectfully submitted,



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APPENDICES

APPENDIX A

Excerpts From MEMORANDUM OPINION and ORDER Filed June 9, 1995[1]

Here the record is simply devoid of evidence that the Board of CISD was deliberately indifferent to the sexual harassment by Coach Perales. There are no facts indicating that the Board had any knowledge of Coach Perales' conduct. The Board was never informed of the allegations made by Mr. and Mrs. Leija regarding Coach Perales until February 1991. At such time, Coach Perales was immediately removed from the classroom. Furthermore, prior to the Board receiving notice of the allegations in February 1991, Coach Perales had worked at CISD for about eight years with no allegations of misconduct. It would be factually impossible for the Board to be deliberately indifferent to Rosemarie's rights when it did not have any knowledge of unconstitutional conduct by Coach Perales. Therefore, the Court finds that CISD is entitled to summary judgment as to the claim it had a custom of tolerating teachers that sexually abused students and thus of acceding to such abuse and of inadequately investigating and disciplining teachers who sexually abused students.

* * * *

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[1]These are excerpts from the opinion filed by the district court, after the trial, to reflect its ruling on the Respondent's Motion for Summary Judgment. Record on Appeal at Vol. VII, pp. 2656-2664.

Here the record indicates that the Board had developed and implemented policies and procedures for handling complaints of sexual abuse. The Board had a policy requiring district personnel to report suspected child abuse to school officials and law enforcement agencies. To implement this policy CISD performed in-service training with teachers regarding their duty to report suspected child abuse. Thus, despite the Leijas' assertions to the contrary, the Court finds that the Board had a policy of training its employees to detect and investigate alleged abuse of students.

* * * *

In this case, there is no evidence in the record that any member of the Board or other high-ranking administrative official should have known of the existence of sexual harassment by Coach Perales. Since there is no evidence that CISD had notice of a deficiency in its procedures, CISD is entitled to summary judgment on the Leija's failure to train claim.

* * * *

In sum, the Leijas have failed to adduce summary judgment evidence of deliberate indifference by CISD toward Rosemarie's constitutional rights. Accordingly, CISD is entitled to summary judgment on the Leija's claim under Section 1983.

* * * *

The Court believes a summary judgment is inappropriate under Title IX. An opinion filed subsequent hereto will set forth this Court's view of Title IX as it relates to this case.

APPENDIX B

Excerpts From MEMORANDUM OPINION and ORDER Filed June 9, 1995[2]

In light of the court's view of Title IX, which has evolved since the trial ended three months ago, the court believes that the agency questions were unnecessary. Instead, in cases such as this one, the court believes that the actions of a teacher should be strictly imputed to an educational institution.

* * * *

[T]he plaintiff must establish some form of imputed liability or else lose her suit. The court has already granted summary judgment on Miss Leija's section 1983 claim because the School District's board had no knowledge of the abuse she suffered and therefore could not have been deliberately indifferent to her rights. The question thus becomes whether the intentional discrimination of Coach Perales against Miss Leija, unknown by the school board or administrators of the Canutillo Independent School District, can still be imputed to the District under Title IX.

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[2]These are excerpts from the opinion filed by the district court, after the trial, to reflect its ruling on Title IX liability standards and the measure of damages. Record on Appeal at Vol. VII, pp. 2665-2690.

These acts of the employees must accordingly be imputed to the district in a meaningful way, so that the intent of Congress to provide a remedy for intentional discrimination is not thwarted. To be certain that it is not, this court thus believes that acts of employees should be imputed to the school district under strict liability principles.

APPENDIX C

Excerpts From ORDER OVERRULING POST-TRIAL MOTIONS AND GRANTING REQUEST TO CERTIFY INTERLOCUTORY APPEAL, Filed September 8, 1995[3]

Under the circumstances, the court remains convinced that its strict liability approach is appropriate for that category of cases under Title IX where a teacher is found to have sexually abused a grade school student.

* * * *

Finally, in regard to *Murray*, the Second Circuit was dealing with a fact situation far different from the fact situation here. For that reason, this court does not believe that *Murray* is instructive in this case. *Murray* involved a female dental student who was allegedly harassed by a dental patient while at the Dental School. By contrast, Miss Leija was sexually abused by her physical education teacher during her second grade year. The facts create two very different categories of cases, at least as analyzed by this court in its Memorandum Opinion.

* * * *

Canutillo Independent School District asks this court to reconsider its liability holding on the basis that a school district

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[3]These are excerpts from the district court's opinion reflecting its findings concerning an interlocutory appeal. Record on Appeal at Vol. VII, pp. 2763-2771.

cannot be liable under Title IX unless it has notice of the intentional discrimination of a teacher against a student. In this case, the School District did not have actual notice of the acts of the teacher against Miss Leija and there is no evidence that it knew or should have known of those acts.

APPENDIX D

Transcript of Proceedings On February 13, 1995[4]

Mr. Kuhn: Could you supplement your findings to find also the deliberate indifference issue because, remember, we outlined that for you and I think that that will be an independent ground for your ruling on the motion for summary judgment is that there is no evidence or deliberate indifference on the part of the school district. At least the 5th Circuit likes guidance as to why you ruled the way you did.

The Court: Depending on what happens in this case, I may not, but I will probably write an opinion but, yes, I will find that the school board did not indicate there would be indifference based upon what it knew because I find, again, of course, respondeat superior does not apply, there is no indication that the school board had direct knowledge, actual notice, or even constructive notice of what was going on here. So, I find that under those circumstances they could not have had --

Mr. Kuhn: Deliberate indifference.

The Court: Deliberate indifference.

Mr. Kuhn: Yes, sir.

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[4]Record on Appeal at Vol. 17, p. 4, l. 13 through p. 5, l. 9

The Court: As to what was happening. I am glad to do that.

APPENDIX E

Excerpts From STUDENT/PARENT HANDBOOK (1989-1990)[5]

This handbook is for the information and guidance of the students at Canutillo Elementary School. In it are rules, regulations and information to be followed by students in their daily school lives.

* * * *

The Canutillo Independent School District adheres to all Title VI regulations prohibiting discrimination because of race, color or national origin. Title IX regulations prohibiting sex discrimination and complies with Section 504 and does not discriminate against disadvantaged or handicapped persons. Inquiries concerning the application of Title VI, IX and Section 504 may be referred to:

Esther E. McLeod, Title IX Coordinator
Dr. Margaret Johnson, 504 Coordinator
7273 Bosque Rd.
Canutillo, Texas 79835
(915) 877-3726

* * * *

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[5]Defendants' Exhibit No. 4.

Students and/or parents who have a complaint regarding possible discrimination on the basis of sex should contact Esther McLeod, Asst. Supt.

APPENDIX F

Excerpts From CISD POLICY MANUAL

EMPLOYEE STANDARDS OF CONDUCT [POLICY NO. DH (E)][6]

The Texas educator should strive to create an atmosphere that will nurture to fulfillment the potential of each student.

* * * *

The educator is responsible for standard practices and ethical conduct toward students, professional colleagues, parents, and the community.

* * * *

The educator shall possess mental health, physical stamina, and social prudence necessary to perform the duties of his professional assignment.

* * * *

The educator shall organize instruction that seeks to accomplish objectives related to learning.

* * * *

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[6]Defendants' Exhibit Nos. 13.

The educator shall comply with written local school board policies, Texas Education Agency regulations, and applicable state laws.

APPENDIX G

Excerpts From CISD POLICY MANUAL

STUDENT WELFARE: CHILD ABUSE
[Policy No. FFG (H) - P][7]

Any person who has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect shall make such reports as are required by law. *Family Code 34.01.*

* * * *

Nonaccusatory reports shall be made reflecting the reporter's belief that one or more of the following acts has occurred:

1. A child has been or will be abused or neglected.

2. A child has died of abuse or neglect.

3. A child has violated the compulsory school attendance laws on three or more occasions.

4. A child has, on three or more occasions, been voluntarily absent from his home without the consent of his parent or guardian for a substantial length of time or without the intent to return.

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[7]Defendants' Exhibit Nos. 19, 20.

* * * *

These reports shall be directed to any of the following:

1. Any local or state law enforcement agency.

2. The Texas Department of Human Services.

3. The agency designated by the court to be responsible for the protection of children.

The report shall contain the name and address of the child, the name and address of the person responsible for the care of child, if available, and any other pertinent information.

* * * *

If a professional has cause to believe that a child has been or may be abused or neglected, that person shall make an oral report as prescribed above not later than 48 hours after the hour the person first suspects that the child has been or may be abused or neglected. In all instances, a written report shall be made within five days to the same agency or department.

APPENDIX H

Excerpts From CISD POLICY MANUAL

STUDENT WELFARE: CHILD ABUSE
[Policy No. FFG (K) - P][8]

Abuse includes the following acts or omissions by a person responsible for a child's care, custody, or control . . . .

* * * *

Failure to make reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child.

* * * *

Sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration with a foreign object, incest, sexual assault, or sodomy inflicted on, shown to, or intentionally practiced in the presence of a child if the child is present only to arouse or gratify the sexual desires of any person.

* * * *

Failure to make a reasonable effort to prevent sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration

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[8]Defendants' Exhibit No. 22.

with a foreign object, incest, sexual assault, or sodomy being inflicted on or shown to a child by another person, or intentionally practiced in the presence of a child by another person if the child is present only to arouse or gratify the sexual desires of any person.

* * * *

Compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code.

APPENDIX I

Excerpts From CISD POLICY MANUAL

STUDENT RIGHTS AND RESPONSIBILITIES
[Policy No. FN (L) - A][9]

Each student is expected to respect the rights and privileges of other students, teachers, and District staff; all teachers, administrators, and other District personnel are expected to have respect for the rights and privileges of students.

* * * *

The administration shall periodically review student handbooks and recommend revisions to the Board for its approval. Student handbooks are approved by the Board and constitute an extension of Board policy. Violation of conduct provisions contained in the handbooks shall result in disciplinary action. (See FO, FOA, FOD).

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[9]Defendants' Exhibit No. 23.